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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re A.Z., a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. ADRIAN Z., Defendant and Respondent; A.Z., Appellant.	F068831 (Super. Ct. No. 13CEJ300295) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Mary Dolas, Commissioner.

Donna Furth, under appointment by the Court of Appeal, for Appellant.

Roland Simoncini, under appointment by the Court of Appeal, for Defendant and Respondent.

Janelle Kelley, County Counsel, Amy K. Cobb, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Hill, P. J., Cornell, J. and Franson, J.

A.Z. (minor) appeals from the juvenile court's order granting reunification services to Adrian Z. (father).[1] On appeal, the minor contends that we should reverse the juvenile court's order because the evidence presented at the dispositional hearing on February 3, 2014, established that granting father reunification services would be detrimental to the minor as a matter of law under Welfare and Institutions Code, section 361.5, subdivision (e)(1).[2] We disagree and affirm the juvenile court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 2013, the Fresno County Department of Social Services (department) filed a dependency petition, alleging the minor (born January 2013) was at a substantial risk of harm due to her parents' failure to protect her from their ongoing issues with domestic violence and substance abuse (§ 300, subd. (b)).

The juvenile court sustained the petition and set the matter for a contested dispositional hearing on the issue of reunification services. While the department recommended granting Angelina M. (mother) reunification services, it recommended denying father services under section 361.5, subdivision (e)(1), on the ground father was currently serving a two-year prison term for a probation violation and was expected to remain incarcerated until October 2015.

The department reported that father was incarcerated at Wasco State Prison (Wasco) on October 29, 2013. As of January 6, 2014, he was still being housed in Wasco's reception unit, where no services were available, and had not yet been assigned a counselor. The department concluded that granting father reunification services would be detrimental to the minor "in that it may delay permanency for the child if [father] is unable to make significant progress in his services in a timely manner." The department

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[1] In this opinion, certain persons are identified by initials, abbreviated names and/or by status in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

[2] Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

observed that father's "prognosis for reunification is poor due to the length of his incarceration, the lack of provision of services in prison, and his extensive history of domestic violence and substance abuse."

Mother, on the other hand, had already begun to participate in services. Mother interacted appropriately and affectionately with the minor during supervised visits. The department opined that, if mother continued to comply with her case plan, it was likely she would reunify with the minor. But if she was unable to reunify with the minor, there was already "an appropriate permanent plan in place with the maternal grandmother" with whom the minor was placed on January 3, 2014. The grandmother was meeting all the minor's needs and was willing to adopt the minor, or act as her guardian, if the parents failed in their reunification efforts.

At the February 3, 2014, dispositional hearing, the social worker assigned to the minor's case testified that father was currently being housed in the reception area of Wasco, where inmates were temporarily housed before being moved to another part of the prison. The social worker spoke with a records clerk who was unable to estimate the amount of time father would spend in the reception area. The social worker was concerned that in light of the "undetermined amount of time in the reception area" father might not start receiving any services until late in the six-month statutory timeframe. When asked why she believed granting reunification services would be detrimental to the minor, the social worker testified: "That it would delay the permanency of the child, that given [father's] extensive history of domestic violence, even if we were to provide services, the prognosis for reunification would appear poor and that—well, I guess those are the two main factors."

Father testified he lived with the minor for two to three months and saw her every day before he was arrested. Father loved the minor and wanted to be reunified with her. Although he was sentenced to two years, father's understanding was he was eligible for half time. Father thought he would soon be assigned a counselor who would help place

him in a facility where he could begin receiving the services he needed. Father explained he had already been in the reception area for three months, which was about the average length of time (i.e., three to four months) inmates spent in reception before being transferred to other facilities.

After listening to the arguments of counsel, the juvenile court granted reunification services to both mother and father, explaining:

> "The Court has carefully reviewed the reports and listened to the testimony. And I'll note essentially the allegations in the petition were identical for the most part as between mother and father and that both mother and father, according to the Department and found true by this court, … put the minor at risk due to failing to provide a safe environment, regular care and supervision and protection and both mother and father had substance abuse issues.
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> "So I don't see how one parent or the other was any worse than the other given that the allegations found true were essentially the same in that both parents participated in domestic violence and had substance abuse issues which caused the minor to be removed.
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> "In reviewing [section] 361.5[, subdivision] (e)(1), including a number of cases that have been published in regards to that section…, it does state that if the parent is incarcerated—where here we have the father incarcerated—the Court shall order reasonable services unless it determines by clear and convincing evidence that those services would be detrimental.
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> "At this point, I think I agree that the uncertainty of many things just works in father's favor and does not provide this court clear and convincing evidence that services would be detrimental.
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> "As far as the age of the child, it's clear what her age is. But as to the time of incarceration, that is unclear given the information he was given a two-year sentence would be eligible for half time. There's nothing that clearly and convincingly states that he would not be released until at least October 2015. There's a possibility it could be sooner than that.
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> "As to the degree of parent-child bonding, both in the report and in the social worker's own testimony was that she was unable to assess, the Department really has not provided clear and convincing evidence that there is or is not any type of bonding between parent and child. Although

in argument counsel asked the Court to speculate. I have to make my decision based on actual evidence presented and the social worker testified similar to what's in the report in that there's really been no assessment whether there is or is not a bond. So there's no clear and convincing evidence there.

"…Given the testimony of [father] as to the nature of the treatment, again, although there's no services while he's in reception, it's neither the father nor the Department knows how long he'll be in reception or how soon he'll be transported to a facility where there likely will be services available to him.

"So the Department hasn't shown by clear and convincing evidence that during the six-month period of time, he would not have the ability to participate in services which is really no different than if he were not incarcerated.

"The Department is in a similar situation, again, with the allegations being the same as between mother and father and the fact that they are offering mother services for the same acts and allegations, once services are offered, there's no real knowledge as to whether a person will participate or not. I don't think that goes to the detriment finding.

"And I agree that there's been speculation that somehow offering services would delay permanency. But there's been no clear and convincing evidence as to exactly how that would occur given the other information in that mother is likely to reunify within a statutory time period.

"So I don't find that the Department has carried their burden to show clear[ly] and convincingly that there would be detriment in offering services. As to whether [father] participates in services that are made available to him or not, there's the consideration of different time."

DISCUSSION

Section 361.5, subdivision (e)(1) provides that if the parent is incarcerated, "the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child." In making that determination, the court must consider a variety of factors, including the age of the child, the degree of parent-child bonding, the length of the parent's sentence, the nature of the

crime, the degree of detriment to the child if services are not offered, and "any other appropriate factors." (§ 361.5, subd. (e)(1).)

We review the juvenile court's grant or denial of reunification services to a parent under the substantial evidence test, "which requires us to determine whether there is reasonable, credible evidence of solid value such that a reasonable trier of fact could make the findings challenged. [Citation.]" (*In re Brian M.* (2002) 82 Cal.App.4th 1398, 1401.)

Here, substantial evidence supports the juvenile court's order. This case was in the reunification phase of dependency proceedings. The Legislature has emphasized that the primary purpose and initial goal of dependency proceedings are to preserve and/or reunify the family. (*In re Heather B.* (1992) 9 Cal.App.4th 535, 541.) Father loved and wished to reunify with the minor, with whom he lived for a few months before his incarceration. The department did not dispute that father would have access to reunification services once he was transferred from the reception area of Wasco where he was being temporarily housed. Based on the length of time he had already spent in the reception area, father anticipated he would soon be assigned a counselor and transferred to a facility where he could begin participating in reunification services. Father's two-year prison term sentence for a probation violation was not a particularly lengthy sentence and there was evidence he would be released sooner. The juvenile court could reasonably determine that granting father reunification services would not be detrimental to the minor in view of the factors set forth in section 361.5, subdivision (e)(1).

While recognizing an order granting reunification services ordinarily is reviewed for substantial evidence, the minor claims the *uncontradicted and unimpeached* evidence in this case established that granting father reunification services would be detrimental to her *as a matter of law*. The authority she cites to support this claim, however, is inapposite because it does not involve an order granting or denying reunification services under section 361.5, subdivision (e)(1). (See *Fabian L. v. Superior Court* (2013) 214

Cal.App.4th 1018 (*Fabian L.*). Rather, *Fabian L.* involved a petition for writ of mandate challenging the sufficiency of the evidence supporting the juvenile court's order under section 366.21, subdivision (e), terminating the father's reunification services at the six-month review hearing and setting a permanency planning hearing. The court of appeal denied the writ petition, finding the juvenile court's order was supported by substantial evidence and the court did not abuse its discretion in discontinuing reunification services. (*Fabian L.*, *supra*, at pp. 1026-1027.) Although the father had substantially complied with his case plan while in prison, the juvenile court reasonably concluded there was no evidence he made more than minimal progress with respect to alleviating or mitigating the problems—i.e., drug abuse and domestic violence issues—that led to the minor's detention. (*Id.* at pp. 1029-1030.)

In dicta relied on by the minor, the *Fabian L.* court went on to conclude that the juvenile court "should have" applied section 361.5 subdivision (e)(1), to deny the father reunification services at the earlier dispositional hearing. (*Fabian L.*, *supra*, 214 Cal.App.4th at p. 1031 ["we hope pointing out the error will serve to remind the court and attorneys to carefully consider in future cases whether providing services to an incarcerated parent will cause detriment to the child (and merely serve to disappoint the parent)"].) The court explained:

> "As aptly noted by one treatise, Seiser and Kumli, California Juvenile Courts Practice and Procedure (2012) section 2.129[2][b], page 2-390 (hereafter Seiser), there is also a statutory provision authorizing courts to deny services to incarcerated parents and it is 'one of the most underutilized dependency provisions.' Section 361.5 recognizes that mandating services for incarcerated parents in some cases may be detrimental to the child.…
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> "We agree with and embrace Seiser's conclusion that 'there are many cases in which the provision of … services has little or no likelihood of success and thus only serves to delay stability for the child, particularly if the incarcerated parent is the only parent receiving services. This is especially true when the parent will be incarcerated longer than the

> maximum time periods for reunification efforts. It is also frequently true when the parent is incarcerated in a facility that has no services sufficient to help the parent work toward reunification and there is no reasonable way to provide services to that parent. Indeed, *to attempt services in such circumstances may be setting everyone up for failure, including the parent, agency, and child.* Thus, in cases such as these, it may be possible to show that providing services to the incarcerated parent would be detrimental to the child since it would delay permanency with no likelihood of success. Juvenile courts and attorneys for social services agencies and children should carefully consider the question of whether providing services to an incarcerated parent would be detrimental to the child and should utilize this provision to deny services when appropriate.' (Seiser, *supra*, § 2.129[2][b], pp. 2-390 to 2-391, italics added.)" (*Fabian L.*, *supra*, 214 Cal.App.4th at pp. 1030-1031.)

Even assuming *Fabian L.* is applicable to this case, its reasoning does not compel the conclusion that the department's evidence established as a matter of law that providing father with reunification services would be detrimental to the minor. While the minor was very young, this was not a case with a poor prognosis for family reunification. (See *Fabian L.*, *supra*, 214 Cal.App.4th at p. 1272; see also *M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 175 [unique developmental needs of infants and toddlers justifies greater emphasis on establishing permanency and stability earlier in dependency proceedings in cases with poor prognosis for family reunification].) Mother was also participating in services and the department thought she was likely to reunify with the minor. Nor was this a case where the incarcerated parent was housed in a facility where insufficient reunification services were available. Rather, it was undisputed father would have access to services once he was transferred out of the temporary reception area. Moreover, despite its emphasis on father's history of substance abuse and domestic violence, the department presented no evidence that father could not benefit from reunification services or was impervious to treatment. And although there was evidence suggesting father might be incarcerated longer than the maximum time period for reunification efforts, this was but one factor to be considered by the juvenile court. On

the record before us, we cannot say the court erred in granting father reunification services under section 361.5 subdivision (e)(1).

We emphasize our opinion addresses only the juvenile court's initial decision to offer father reunification services. Nothing in this opinion should be construed as a comment on the propriety or wisdom of continuing or terminating reunification services based on events occurring after the dispositional order.

DISPOSITION

The February 3, 2014, order granting reunification services to father is affirmed.